

**STATE OF WISCONSIN
SUPREME COURT
Case No. 99-3297-OA**

WISCONSIN PROFESSIONAL POLICE ASSOCIATION, INC.,
JOHN CHAREWICZ, DAVID MAHONEY, SUSAN ARMAGOST,
STEVEN URSO and STATE ENGINEERING ASSOCIATION,
by its President, THOMAS H. MILLER, DAVID BUSHKOPF,
ROSS JOHNSON, MELVIN SENSENBRENNER, BERNARD KRANZ
and THOMAS H. MILLER,

Petitioners,

vs.

GEORGE LIGHTBOURN, Acting Secretary of the Wisconsin
Department of Administration, JACK C. VOIGHT,
Wisconsin State Treasurer, WISCONSIN EDUCATION ASSOCIATION
COUNSEL, by its President, TERRY CRANEY and
its Vice-President, STAN JOHNSON, and
DONALD KRAHN, MARGARET GUERTLER, GERALD MARTIN,
and PHYLLIS POPE,

Respondents.

**RESPONSE TO MOTION FOR INTERIM RELIEF PENDING
FINAL RESOLUTION BY COURT**

HAUS, ROMAN and BANKS, LLP

Michael E. Banks

State Bar Number: 1022148

William Haus

State Bar Number: 1015390

148 East Wilson Street
Madison, WI 53703-3423
Telephone: (608) 257-0420
Facsimile: (608) 257-1383

By Motion dated December 20, 2000, Respondents Wisconsin Education Association, et al. ("WEAC") moved this Court to lift the injunction imposed in the above-captioned matter as it relates to Sections 12, 14, 25 and 26 of 1999 Wisconsin Act 11 ("Act 11"). By Order dated December 23, 2000, this Court ordered all parties to file a response to WEAC's Motion, and to explain any objections to the relief requested by WEAC.

I. THE INJUNCTION MAY PROPERLY BE LIFTED WITH RESPECT TO SECTIONS 12, 14 AND 26 OF ACT 11

The State Engineering Association, et al. ("SEA") does not oppose the injunction being lifted with respect to Sections 12, 14 and 26 of Act 11. These provisions were not challenged by SEA, and do not involve the payment of any new benefits to WRS Participants. Since no new or increased benefits are being provided by Sections 12, 14 and 26, these Sections can be implemented without fear of any potential conflict with this Court's ultimate decision and remedy with respect to the challenged funding mechanisms of Act 11. For the same reason, implementation of these Sections will not have the potential of running afoul of this Court's ultimate decision on whether Article IV, Section 26 of the Wisconsin Constitution permits the legislature to increase pension benefits to WRS Participants without providing for

adequate "State Funds" to pay for such increased benefits. *See*, SEA Petitioners' Brief at 46-48, and Combined Reply Brief of SEA Petitioner at 24-25.

SEA continues to maintain that the provisions of Act 11 are severable under § 990.001(11), Wis. Stats. SEA, therefore, does not oppose WEAC's Motion as it relates to Sections 12, 14 and 26 of Act 11. Each of these Sections can clearly be implemented without any conflict with this Court's ultimate decision on the validity of the provisions of Act 11 being challenged by Petitioners herein.

II. THIS COURT SHOULD MAINTAIN THE INJUNCTION WITH RESPECT TO SECTION 25 OF ACT 11

SEA opposes WEAC's Motion as it relates to Section 25 of Act 11. Section 25 of Act 11 provides for increased benefits to WRS Participants who die before age 55, however, Act 11 does not provide any State funding to pay the cost of providing such increased benefits to Participants. Section 25 of Act 11 is invalid for its failure to "provide[] for sufficient state funds to cover the costs of the increased benefits" as required by Article IV, Section 26 of the Wisconsin Constitution. *See*, SEA Petitioners' Brief at 46-48, and Combined Reply Brief of SEA Petitioner at 24-25. Absent additional State funding, the increased benefits provided by Section 25 are

dependent upon the challenged funding mechanisms¹ of Act 11, which may be invalidated by this Court. In the event the challenged funding mechanisms of Act 11 are found to be unconstitutional, this Court will have to face the issue of what provisions of Act 11, if any, are severable. This Court may hold that Act 11 is severable, but may invalidate all portions of Act 11 that depend on the challenged funding mechanisms at issue herein to pay the cost of providing increased benefits, including Section 25. This Court may also hold that Act 11 is not severable, thereby invalidating Section 25 along with the remainder of Act 11. In any event, there are a number of possible approaches that could be taken by this Court that will result in Section 25 being invalidated. In each such case, if the increased death benefits provided by Section 25 are paid out to Participants, and the provision is later invalidated, it will be necessary to craft a remedy that deals with the difficult issue of recouping the funds that were improperly paid out of the Trust Fund -- either by ordering the State to repay such amounts to the Trust Fund as damages, or ordering such funds to be recovered from the estates or beneficiaries of deceased Participants. The magnitude of the problems that would be created by implementation of Section 25 of Act 11 prior to this Court's decision on the merits were more fully described in

¹Challenged funding mechanisms refers broadly to the challenged recognition from the TAA, the employer credit account provisions of Act 11, and the funding of new or increased benefits with funds other than "State Funds."

the Brief In Support of Petition For Preliminary Injunction Or, Alternatively, For a Writ of Prohibition, and the Affidavit of David A. Stella filed by the Employee Trust Funds Board and the Department of Employee Trust Funds in support of the Injunction granted by this Court. The difficult recoupment and administrative issues identified by the Employee Trust Funds Board and the Department of Employee Trust Funds continue to strongly favor maintaining an injunction with respect to the implementation of Section 25 of Act 11.

Finally, while WEAC has correctly identified some potential "irreparable harm" that could befall Participants who are denied the ability to elect to participate in the variable annuity trust prior to December 31, 2000 (*See*, WEAC' Motion at 8 and footnote 4), no such irreparable harm will come as a result of maintaining the injunction with respect to Section 25. If this Court ultimately holds that Section 25 passes constitutional muster, and that the invalid provisions of Act 11 may be severed in a manner that permits Section 25 to be implemented, the death benefits paid to the estates and beneficiaries of those whose benefits would be enhanced under Section 25 can be recalculated and paid out after the date of this Court's decision. Therefore, any "harm" caused by the delay in implementing Section 25 is purely monetary in nature, and is of the type that can be easily remedied after this Court's decision is rendered. No irreparable harm will be suffered by Participants by virtue of this Court

maintaining the injunction with respect to Section 25 of Act 11.

Respectfully submitted on this 27th day of December, 2000.

HAUS, ROMAN and BANKS

Michael E. Banks
State Bar No.1022148
William Haus
State Bar No.1015390

Submitted on Behalf of the SEA Petitioners

148 East Wilson Street
Madison, WI 53703
Telephone: (608) 257-0420
Facsimile: (608) 257-1383